No. 09-1

In the Supreme Court of the United States

HOLY SEE, PETITIONER

v.

JOHN V. DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, establishes that foreign sovereigns are presumptively immune from suit in United States courts, 28 U.S.C. 1604, unless a claim falls within one of the exceptions to immunity enumerated in 28 U.S.C. 1605 and 1607. The tort exception to immunity permits claims against a foreign state based on "the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5).

The question presented is whether Section 1605(a)(5) authorizes a court to exercise jurisdiction over respondent's vicarious liability claim against petitioner, the Holy See, for a priest's sexual abuse committed in Oregon, where sexual abuse is outside the scope of the priest's employment as a matter of Oregon law.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 7
I. The court of appeals erred in holding that respondent's claim falls within the FSIA's tort exception 8
A. The court of appeals erred in holding that sexual abuse came within the priest's scope of employment under Oregon law 9
B. The court of appeals appears to have further erred in conflating the FSIA's jurisdictional scope-of-employment inquiry with the separate question of respondeat superior liability under state substantive law 14
II. The Court should remand for further consideration of whether the district court has jurisdiction over respondent's vicarious liability claim under the FSIA's tort exception 17
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 3, 19
Cassirer v. *Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009) 5
Chesterman v. *Barmon*, 753 P.2d 404 (Or. 1988) 10
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 19
Fearing v. *Bucher*:
977 P.2d 1163 (Or. 1999) 4, 6, 10, 11, 12, 13

Cases—Continued: Page

936 P.2d 1023 (Or. Ct. App. 1997), rev'd in pertinent part, 977 P.2d 1163 (Or. 1999) 10

Foremost-McKesson, Inc. v. *Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) 20

Joseph v. *Office of the Consulate Gen. of Nig.*, 830 F.2d 1018 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988) 4, 6, 14, 15, 16

Lourim v. *Swensen*, 977 P.2d 1157 (Or. 1999) 11

Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. *Elahi*, 546 U.S. 450 (2006) 20

Minnis v. *Oregon Mut. Ins. Co.*, 48 P.3d 137 (Or. 2002) 6, 11, 12, 13

O'Bryan v. *Holy See*, 556 F.3d 361 (6th Cir.), cert. denied, 130 S. Ct. 361 (2009) 4, 17

Primeaux v. *United States*, 181 F.3d 876 (8th Cir. 1999), cert. denied, 528 U.S. 1154 (2000) 16, 18

Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607 (1992) 19

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 19

Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 19

Schmidt v. *Archdiocese of Portland*, 180 P.3d 160 (Or. Ct. App. 2008), rev'd on other grounds *sub nom. Schmidt* v. *Mt. Angel Abbey*, 223 P.3d 399 (Or. 2009) 13

Verlinden B.V. v. *Central Bank of Nig.*, 461 U.S. 480 (1983) 2

Williams v. *United States*, 350 U.S. 857 (1955) 9

Statutes: Page

Federal Tort Claims Act:
28 U.S.C. 1346(b)(1) 18
28 U.S.C. 2680(a) 2
28 U.S.C. 2680(h) 2
Foreign Sovereign Immunities Act of 1976:
28 U.S.C. 1330 1
28 U.S.C. 1330(a) 2
28 U.S.C. 1602 *et seq.* 1
28 U.S.C. 1604 2
28 U.S.C. 1605 ..... 2, 20
28 U.S.C. 1605(a)(2) 5
28 U.S.C. 1605(a)(5) ..... *passim*
28 U.S.C. 1605(a)(5)(A) 2
28 U.S.C. 1605(a)(5)(B) 2, 5
28 U.S.C. 1606 ..... 3, 15
28 U.S.C. 1607 2

Miscellaneous:

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 17, 19
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 2
1 Office of the Legal Adviser, U.S. Dep't of State, *Pub. No. 10120, Cumulative Digest of United States Practice in International Law, 1981-1988* (Marian Nash (Leich) ed., 1993) 4
1 Restatement (Second) of Agency (1958) 14

Miscellaneous—Continued: Page

Restatement (Third) of Agency (2006):
Vol. 1 10
Vol. 2 14

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand to the court of appeals for further consideration. In the alternative, the petition for a writ of certiorari should be denied.

STATEMENT

1. Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, to codify the circumstances under which a foreign state may be sued in a civil action in a court in the United States. The FSIA largely codified the so-called restric-

tive theory of foreign sovereign immunity, under which "the sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) (*1976 House Report*); see *Verlinden B.V.* v. *Central Bank of Nig.*, 461 U.S. 480, 486-488 (1983).

Under the FSIA, the general rule is that "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. 1604. The statute, however, enumerates certain exceptions to that immunity. 28 U.S.C. 1605, 1607. One such exception permits certain tort suits against a foreign state. 28 U.S.C. 1605(a)(5). In relevant part, the tort exception provides that a foreign state shall not be immune from the jurisdiction of United States courts in any case "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."[1] *Ibid.*

If a civil suit falls within one of the FSIA's enumerated exceptions to immunity, a federal court has subject-matter jurisdiction over the suit. 28 U.S.C. 1330(a); see

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[1] The FSIA excludes from the tort exception claims arising from discretionary acts, and those based on certain intentional torts (malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights). 28 U.S.C. 1605(a)(5)(A) and (B). Congress modeled these exclusions on the similar exceptions in the Federal Tort Claims Act (FTCA), see 28 U.S.C. 2680(a) and (h), to the United States' amenability to suit for tort. *1976 House Report* 21.

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). If a foreign state is not immune from suit, the FSIA provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606.

2. Respondent brought this action for damages in the United States District Court for the District of Oregon, alleging that he was sexually abused by a Catholic priest in the mid-1960s. Pet. App. 69a-73a. Respondent alleged that the priest had abused other children in other parishes before being transferred to the Portland church at which he abused respondent. *Id.* at 138a-140a. The priest had used his position of authority, respondent asserted, in order to gain the trust of respondent and his family, and then, when respondent was a teenager, the priest had molested him. *Id.* at 144a-145a.

Respondent named as defendants the Holy See (the petitioner in this case); the Archdiocese of Portland, Oregon; the Catholic Bishop of Chicago; and the Order of the Friar of Servants. Pet. App. 5a. As relevant here, respondent alleged that petitioner is vicariously liable, under the doctrine of respondeat superior, for the priest's sexual abuse, because "the molestation * * * occurred while [the priest] was acting in the scope of his employment." *Id.* at 147a-148a. Respondent also asserted that petitioner was directly liable for negligence in supervising the priest, *id.* at 149a-150a; and that petitioner fraudulently concealed the priest's previous acts of abuse, *id.* at 150a-152a.

Petitioner moved to dismiss the complaint for lack of subject-matter jurisdiction, arguing that it is entitled to immunity under the FSIA. Pet. App. 8a. Petitioner is recognized as a foreign sovereign by the United States,

and the two states have maintained formal diplomatic relations since 1984. See 1 Office of the Legal Adviser, U.S. Dep't of State, *Pub. No. 10120, Cumulative Digest of United States Practice in International Law, 1981-1988,* at 894 (Marian Nash (Leich) ed., 1993). Accordingly, petitioner is subject to civil suit in United States courts only if the suit comes within one of the exceptions to immunity specified in the FSIA. See, *e.g.*, *O'Bryan* v. *Holy See*, 556 F.3d 361, 374 (6th Cir.), cert. denied, 130 S. Ct. 361 (2009). In response to petitioner's motion to dismiss, respondent argued that the district court had subject-matter jurisdiction under the FSIA's tort exception, 28 U.S.C. 1605(a)(5). Pet. App. 70a.

The district court concluded that it had jurisdiction over respondent's vicarious liability claim pursuant to the FSIA's tort exception. Pet. App. 106a-113a. The court began by noting that the Ninth Circuit had construed Section 1605(a)(5)'s requirement that the tortious act be committed by an "employee * * * while acting within the scope of his office or employment" to equate to a finding that the doctrine of respondeat superior applies to the tortfeasor's act as a matter of state law. *Id.* at 111a (discussing *Joseph* v. *Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1025 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988)).

Applying Oregon law, the court explained that in *Fearing* v. *Bucher*, 977 P.2d 1163, 1166 (1999), the Oregon Supreme Court had held that an employer may be held liable "not only for the torts of his employee when the employee is acting within the scope of his employment, but also for the intentional criminal acts of employees if the acts that lead to the criminal conduct were within the scope of employment." Pet. App. 111a (citations omitted). Thus, *Fearing* held that an employer

could be held vicariously liable for a priest's sexual abuse if that abuse was causally related to conduct—such as a priest's pastoral duties—that was within the priest's scope of employment. *Id.* at 112a.

Because respondent alleged that the sexual abuse arose out of "conduct preceding the sexual abuse [that] fell within the scope of [the priest's] employment," the district court held that the complaint revealed "sufficient grounds upon which to hold [the priest's] employer liable under a theory of respondeat superior." Pet. App. 112a-113a. The court therefore concluded that respondent's vicarious liability claim fell within Section 1605(a)(5)'s tort exception.[2] *Ibid.*

3. Invoking the collateral order doctrine, see *Cassirer* v. *Kingdom of Spain*, 580 F.3d 1048, 1055 (9th Cir. 2009), petitioner appealed the district court's adverse foreign sovereign immunity rulings. Pet. App. 8a-9a, 14a-15a. The court of appeals affirmed the district court's holding that respondent's respondeat superior

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[2] The district court also made other rulings that are not presently before this Court. It held that it had jurisdiction over respondent's negligence claims against petitioner under the tort exception, Pet. App. 113a-128a; that there was no jurisdiction over respondent's fraud claim because such claims are excluded from the tort exception, *id.* at 107a (citing 28 U.S.C. 1605(a)(5)(B)); and that none of respondent's claims fell within the FSIA's commercial activities exception (28 U.S.C. 1605(a)(2)), Pet. App. 105a-106a.

claim could go forward under the tort exception.[3] *Id.* at 29a-35a.

Like the district court, the court of appeals began by observing that the "'scope of employment' provision of the tortious activity exception essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals" under state law. Pet. App. 31a-32a (quoting *Joseph*, 830 F.2d at 1025). The court explained that the Oregon Supreme Court had held in *Fearing* that although "the priest's 'alleged sexual assaults on plaintiff clearly were outside the scope of his employment' under the traditional test," courts could impose vicarious liability if "acts that *were* within the scope of employment resulted in the acts which led to injury to [the] plaintiff." *Id.* at 33a (brackets in original) (quoting *Fearing*, 977 P.2d at 1166).

According to the court of appeals, "[t]he Oregon Supreme Court has since clarified that *Fearing* created a 'scope of employment' test specifically applicable to intentional torts." Pet. App. 33a. In *Minnis* v. *Oregon Mutual Insurance Co.*, 48 P.3d 137 (Or. 2002), the Ninth Circuit stated, the Oregon Supreme Court "ma[de] clear that, rather than holding that sexual abuse is not within

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[3] The court of appeals reversed the district court's holding that respondent's negligence claim came within the tort exception. Pet. App. 3a-4a; see note 2, *supra*. Respondent cross-appealed the district court's ruling that the FSIA's commercial activity exception did not permit his claims, Pet. App. 15a, but the court of appeals held that it lacked appellate jurisdiction over the cross-appeal. *Id.* at 15a-19a. Neither of these issues is before the Court in the present certiorari petition.

Judge Berzon dissented in part, explaining that she would have held that respondent's negligence claims could go forward under the commercial activity exception. Pet. App. 40a-64a. Judge Fernandez filed a concurring opinion responding to Judge Berzon's partial dissent. *Id* at 64a-68a.

the scope of employment, *Fearing* created an alternative test with respect to the second and third factors of the 'within the scope of employment' standard." Pet. App. 34a. Thus, the Ninth Circuit continued, "[a]n intentional tort is within the scope of employment and can support respondeat superior liability for the employer, if conduct that was within the scope of employment" directly led to the intentional tort. *Ibid.*

Because respondent, like the plaintiff in *Fearing*, alleged that the priest's pastoral activities led to the priest's sexual abuse of respondent, the Ninth Circuit concluded that respondent had adequately alleged "an injury caused by an 'employee' of the foreign state while acting 'within the scope of his . . . employment.'" Pet. App. 34a-35a (quoting 28 U.S.C. 1605(a)(5)). The court of appeals therefore held that the district court had jurisdiction over respondent's claim against petitioner under the tort exception, and it remanded for further proceedings.[4] *Id.* at 35a, 40a.

DISCUSSION

The court of appeals erred in holding that the district court has jurisdiction under the FSIA's tort exception over respondent's claim that petitioner is vicariously liable for sexual abuse committed by a priest. That decision does not merit plenary review because it does not conflict with any decision of this Court or another court

[4] Petitioner also contended that the tort exception did not apply because the priest who committed the acts of sexual abuse was not petitioner's employee, see 28 U.S.C. 1605(a)(5). Pet. App. 30a. The court of appeals held that for purposes of petitioner's motion to dismiss, respondent had sufficiently alleged that the priest was an employee of petitioner. *Id.* at 30a-31a. Petitioner has not challenged that ruling in this Court. See Pet. i. Under the court of appeals' decision, petitioner is free to litigate that issue before the district court on remand.

of appeals. But because the nature of the Ninth Circuit's ruling on the interpretation of the FSIA is unclear and the court did not address a decision of the Oregon Court of Appeals that clarifies the Oregon precedents upon which the Ninth Circuit relied, the Court may wish to grant the petition, vacate the judgment of the court of appeals, and remand to that court for further consideration.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT'S CLAIM FALLS WITHIN THE FSIA'S TORT EXCEPTION

In the view of the United States, the court of appeals erred in holding that respondent's vicarious liability claim falls within the FSIA's tort exception. Oregon law holds that sexual abuse and similar intentional torts generally do not come within an employee's scope of employment, but that an employer nevertheless may in some circumstances be held vicariously liable for an employee's intentional tort. The Ninth Circuit misunderstood Oregon law, and held that an intentional tort falls within the scope of employment if non-tortious conduct leading to the tort was itself within the scope of employment. Pet. App. 34a. The court also appears to have made a second, interrelated error, for it may have assumed that Section 1605(a)(5)'s scope-of-employment requirement is satisfied any time state law would impose vicarious liability on an employer, whether or not the tort itself was committed by the employee "while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5); see Pet. App. 31a-32a. Contrary to the court of appeals' apparent assumption, however, the scope-of-employment analysis for purposes of jurisdiction under the FSIA is distinct from the question whether an em-

ployer may be held vicariously liable on the merits. A court may not use a state liability rule to expand the grounds on which the FSIA permits the court to exercise jurisdiction over claims against a foreign sovereign.

A. The Court Of Appeals Erred In Holding That Sexual Abuse Came Within The Priest's Scope Of Employment Under Oregon Law

Under the FSIA's tort exception, a foreign state is not immune from suit in a case in which damages are sought for injuries "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). Following circuit precedent, the court of appeals looked to state law to determine whether the alleged tortious act—the priest's sexual abuse—satisfied Section 1605(a)(5)'s scope-of-employment requirement, Pet. App. 31a-32a, and interpreted Oregon law to hold that an intentional tort that is outside the scope of employment comes within the scope of employment if it is causally related to precursor acts that are within the scope of employment.[5] That conclusion is erroneous.

1. Under Oregon law, as in most States, the general rule is that an employer may be held liable for the tortious acts of an employee "[u]nder the doctrine of *respondeat superior*" when "the employee acts within the

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[5] This Court has not addressed whether state or federal law controls the tort exception's scope-of-employment determination. Cf. *Williams* v. *United States*, 350 U.S. 857 (1955) (per curiam) (remanding in a Federal Tort Claims Act case to permit the court of appeals to apply state law in determining whether a government employee was acting within the scope of his employment). That issue is not presented in the petition.

scope of employment." *Chesterman* v. *Barmon*, 753 P.2d 404, 406 (Or. 1988); see generally 1 Restatement (Third) of Agency § 2.04, at 139-142 (2006). In *Chesterman*, the Oregon Supreme Court identified three requirements for finding that an employee was acting within the scope of employment:

> (1) whether the act occurred substantially within the time and space limits authorized by the employment; (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a kind which the employee was hired to perform.

753 P.2d at 406.

Subsequently, in *Fearing* v. *Bucher*, 977 P.2d 1163, 1166 (1999), the Oregon Supreme Court provided an additional basis for respondeat superior liability, and departed from the general rule that an employer's respondeat superior liability is co-extensive with an employee's scope of employment. The court thus effectively uncoupled the question whether the tort itself was committed within the scope of employment from the ultimate question whether an employer may be held vicariously liable for that tort, by holding that an employer may be vicariously liable for certain torts committed outside the employee's scope of employment.

In *Fearing*, the court applied the *Chesterman* scope-of-employment inquiry to a plaintiff's claim that an archdiocese should be held vicariously liable for a priest's sexual assault on the plaintiff.[6] The Oregon Supreme Court began by observing that the priest's "alleged sexual assaults on plaintiff clearly were outside

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[6] See *Fearing* v. *Bucher*, 936 P.2d 1023, 1024 (Or. Ct. App. 1997).

the scope of his employment." *Fearing*, 977 P.2d at 1166. The court explained that "in the intentional tort context," however, a court need not determine whether "the intentional tort *itself* was committed in furtherance of any interest of the employer or was the same kind of activities that the employee was hired to perform"—in other words, whether the tortious act itself satisfies the second and third factors in the *Chesterman* scope-of-employment analysis—because such a finding is not "necessary to vicarious liability." *Id.* at 1167. Rather, the court held, the plaintiff could assert a claim of respondeat superior liability if "conduct that was within the scope of [the priest's] employment * * * arguably resulted in the acts that caused plaintiff's injury." *Ibid*; see *id.* at 1166; *Lourim* v. *Swensen*, 977 P.2d 1157, 1160 (Or. 1999) (same).

Applying that standard, the Oregon Supreme Court held that the complaint adequately alleged that the priest's pastoral relationship with the plaintiff—the priest's actions as "youth pastor, spiritual guide, confessor," *Fearing*, 977 P.2d at 1166—satisfied the three *Chesterman* requirements, and was therefore within the scope of the priest's employment. *Id.* at 1166-1167. Because the complaint alleged that the sexual abuse was a "direct outgrowth" of the pastoral relationship, the court held that the "allegations * * * are sufficient to state a claim of vicarious liability." *Id.* at 1168.

More recently, the Oregon Supreme Court explained in *Minnis* v. *Oregon Mutual Insurance Co.*, 48 P.3d 137 (2002), that the *Fearing* analysis applies only when the first *Chesterman* requirement is met: that is, when an employee commits an intentional tort within the time and space limits of employment. *Id.* at 145. In that context, the court may proceed to the second and third

Chesterman requirements; but, the court noted, given that "[e]mployers do not ordinarily hire others for the specific purpose of committing intentional torts, * * * vicarious liability would be defeated in almost every instance under * * * a standard" that focuses on whether the intentional tort itself satisfies those requirements. *Id.* at 144. The Oregon Supreme Court in *Minnis* explained that *Fearing* therefore analyzes whether "the complaint contains sufficient allegations of [employee] conduct that was within the scope of his employment" because it was undertaken to serve the employer's purposes and was of the type for which the employee was hired. *Id.* at 145 (brackets in original). If that conduct in turn led to the tortious act, then the employee's "tortious conduct * * * was sufficiently connected to the employer's purpose to support the employer's vicarious liability." *Ibid.*

2. The court of appeals erred in interpreting *Minnis* to hold that "*Fearing* created an alternative test" under which "[a]n intentional tort *is* within the scope of employment * * * if conduct that was within the scope of employment" was causally related to the intentional tort. Pet. App. 34a (emphasis added). That characterization of Oregon law conflates the scope-of-employment inquiry with the ultimate question whether the employer may be held vicariously liable for the employee's tort. The Oregon Supreme Court in *Fearing* stated unequivocally that the priest's "alleged sexual assaults on plaintiff clearly were outside the scope of employment." 977 P.2d at 1166. Starting from that proposition, *Fearing* altered the liability inquiry for cases involving intentional torts: rather than focusing on "the intentional tort *itself*," a court should instead consider whether the employee engaged in other, non-tortious conduct within

the scope of employment "that arguably resulted in the acts that caused plaintiff's injury." *Id.* at 1167.

Thus, for purposes of determining an employer's vicarious liability for an intentional tort, *Fearing* shifts the focus of the second and third *Chesterman* factors from the tort itself to causally related, non-tortious precursor conduct. But *Fearing* did not thereby redefine what acts are within the scope of employment, nor did it recharacterize the sexual assault in that case as itself coming within the scope of employment, as the Ninth Circuit held. And nothing in *Minnis* supports the Ninth Circuit's interpretation. See 48 P.3d at 144-145 (discussing *Fearing*). Indeed, after oral argument in this case but before the Ninth Circuit issued its decision, the Oregon intermediate appellate court, after reviewing the Oregon Supreme Court's decisions in *Fearing* and *Minnis*, reaffirmed that "sexual assault was not within the scope of [the priest's] employment." *Schmidt* v. *Archdiocese of Portland*, 180 P.3d 160, 177 (Or. Ct. App. 2008), rev'd on other grounds *sub nom. Schmidt* v. *Mt. Angel Abbey*, 223 P.3d 399 (Or. 2009).

Because the alleged sexual abuse in this case did not fall within the scope of the priest's employment as a matter of Oregon law, respondent's suit does not involve a "tortious act or omission * * * of any official or employee of [a] foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). Accordingly, the FSIA's tort exception did not abrogate petitioner's immunity and provide subject-matter jurisdiction over respondent's claim against petitioner for the priest's sexual abuse.[7]

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[7] Had Oregon redefined the scope of employment, as the court of appeals believed, to include intentional torts not intended by the em-

B. The Court Of Appeals Appears To Have Further Erred In Conflating The FSIA's Jurisdictional Scope-Of-Employment Inquiry With The Separate Question Of Respondeat Superior Liability Under State Substantive Law

A second misconception also appears to have contributed to the Ninth Circuit's conflation of the scope-of-employment inquiry for FSIA jurisdictional purposes and the distinct question whether vicarious liability could be imposed under Oregon law. The Ninth Circuit characterized the "'scope of employment' provision of the tortious activity exception" as "essentially requir[ing] a finding that the doctrine of respondeat superior applies to the tortious acts of individuals." Pet. App. 31a-32a (quoting *Joseph* v. *Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1025 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988)). That statement suggests that the court of appeals assumed that Section 1605(a)(5) does not require that the employee's tort itself have been committed while the employee was acting within the scope of employment, but rather requires only that the employer may be held vicariously liable for the tort of its employee as a matter of state substantive

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ployee to serve the employer's purpose, that rule would be a departure from the traditional understanding of acts within the scope of employment. Cf., *e.g.*, 1 Restatement (Second) of Agency § 228(2), at 504 (1958); *id.* § 229, at 506; *id.* § 229 cmt. b, at 508; *id.* § 229 cmt. f, at 511; cf. also 2 Restatement (Third) of Agency § 7.07 cmt. b, at 201 (2006). Such a departure might raise the question whether Congress intended to permit the application of such an atypical understanding of scope of employment under Section 1605(a)(5). That question is not, however, presented here.

tort law.[8] Thus, the court of appeals apparently believed that it could look to state-law liability rules to determine whether the tort exception should apply, without regard to whether the tort was within the scope of the priest's employment.[9] As petitioner argues (Pet. 22-24), that view is mistaken.

The FSIA establishes a rule of liability under which a foreign state will be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. But that rule of liability applies only "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607" of the FSIA. *Ibid.*; see Pet. 22. Oregon has chosen as a matter of its substantive law to impose vicarious liability in certain circumstances on an

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[8] That reading of the court of appeals' opinion is reinforced by the next sentence in the opinion, which states: "[T]he Oregon Supreme Court has directly addressed whether a church can be liable under respondeat superior for the actions of a priest who sexually assaults a parishioner." Pet. App. 32a (discussing *Fearing*).

[9] The court of appeals elsewhere stated that it believed that, under Oregon law, sexual abuse was within the scope of employment if the tort resulted from precursor conduct that was within the scope of employment. Pet. App. 34a; see also *id.* at 4a (observing that respondent had "sufficiently alleged" that the priest was an employee of petitioner "acting within the 'scope of his employment' under Oregon law"). Those statements might suggest that the court correctly believed that the FSIA's tort exception requires the alleged tortious acts to have been within the scope of employment, see 28 U.S.C. 1605(a)(5). But the court's error as to state law—its conflation of the scope-of-employment determination and the ultimate question of respondeat superior liability—may also have been the result of the court's making a similar error with respect to the FSIA: construing the FSIA's scope-of-employment jurisdictional prerequisite as interchangeable with "a finding that the doctrine of respondeat superior applies to the tortious acts," Pet. App. 31a-32a (quoting *Joseph*, 830 F.2d at 1025).

employer for its employee's intentional tort even if the tort itself was committed outside the scope of employment. But a foreign sovereign may be found liable under that substantive rule only if the court first determines that it has jurisdiction over the foreign state because the plaintiff's claim comes within the tort exception to sovereign immunity. That exception authorizes suit against a foreign state for a tort by the state's employee only if the employee committed the tort "while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5); cf. *Primeaux* v. *United States*, 181 F.3d 876, 878 (8th Cir. 1999) (en banc) ("[E]ven if state law extends a private employer's vicarious liability to employee conduct not within the scope of employment, the government's [Federal Tort Claims Act] liability remains limited to employee conduct within the scope of employment, as defined by state law."), cert. denied, 528 U.S. 1154 (2000).

To the extent that the Ninth Circuit equated the FSIA tort exception's scope-of-employment jurisdictional requirement with broader state-law respondeat superior liability, it erred.[10] Because the priest's alleged sexual abuse of respondent was not within the scope of the priest's employment, respondent's vicarious liability claim does not come within the FSIA's tort exception to foreign sovereign immunity, and petitioner may not be

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[10] In equating the two concepts, the court of appeals relied on *Joseph*'s statement that the tort exception "essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals." 830 F.2d at 1025. But *Joseph*'s actual holding was that the plaintiff's claims fell within the tort exception because the conduct at issue was within the employee's scope of employment under state law. *Id.* at 1025-1026.

subject to suit for that claim under Oregon's respondeat superior liability rule.

II. THE COURT SHOULD REMAND FOR FURTHER CONSIDERATION OF WHETHER THE DISTRICT COURT HAS JURISDICTION OVER RESPONDENT'S VICARIOUS LIABILITY CLAIM UNDER THE FSIA'S TORT EXCEPTION

The court of appeals erred in holding that respondent's claim fell within the FSIA's tort exception to foreign sovereign immunity. Although the decision does not merit plenary review, the Court may wish to grant the petition, vacate the judgment of the court of appeals, and remand to that court for further consideration.

A. Plenary review is not warranted at this time. The court of appeals' decision does not conflict with any decision of another court of appeals. Petitioner asserts that *O'Bryan* v. *Holy See*, 556 F.3d 361, 385 (6th Cir.), cert. denied, 130 S. Ct. 361 (2009), is "inconsistent" with the decision below, in that it found the tort exception inapplicable because Kentucky law held that the sexual abuse in that case was outside the scope of a priest's employment. Reply Br. 3-4. But that decision does not create a circuit conflict. The Sixth Circuit was interpreting Kentucky, not Oregon, law. And unlike Oregon, Kentucky does not consider precursor conduct in determining whether tortious conduct not within the scope of employment may subject an employer to respondeat superior liability. See *O'Bryan*, 556 F.3d at 383. To the extent that the Ninth Circuit's decision rested primarily on its misinterpretation of Oregon state law, then, the decision does not conflict with *O'Bryan*, and in any event, a court of appeals' construction of state law does not ordinarily merit plenary review. See generally Eu-

gene Gressman et al., *Supreme Court Practice* 260-262 (9th ed. 2007) (Gressman).

The Ninth Circuit's decision in this case also appears to have rested on a misunderstanding of the scope of the FSIA's tort exception to foreign sovereign immunity, but that misapprehension likewise does not create a conflict with *O'Bryan*. Because the Sixth Circuit concluded that the sexual assault was not within the scope of employment under Kentucky law, that court had no occasion to consider whether the tort exception permits jurisdiction based on torts that are not within the scope of employment but nonetheless may be the basis for respondeat superior liability under state tort law. Nor does petitioner contend that Oregon's expansive rule permitting respondeat superior liability for torts that are not themselves within the scope of employment has been widely adopted by other States, such that the question of the interaction of such rules with Section 1605(a)(5) is likely to recur with frequency.[11] Reply Br. 2-4, 7.

The court of appeals' decision also does not directly conflict with this Court's precedent. See Pet. 18-21, 24-28. The decision below, at some level of generality,

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[11] Petitioner observes that the FSIA's tort exception is modeled on the FTCA, which provides jurisdiction over claims against the United States based on the negligent or wrongful acts of a federal employee "while acting within the scope of his office or employment" under circumstances in which a private person would be liable. 28 U.S.C. 1346(b)(1); Pet. 24-25; Reply Br. 4-5; see note 1, *supra*; *Primeaux*, 181 F.3d at 878 (FTCA liability is limited to "employee conduct within the scope of employment," even if state-law vicarious liability rule is more expansive.). Because the decision below concerns only the FSIA, however, it does not squarely conflict with any decision on the FTCA, and does not provide a vehicle to review the scope of the FTCA's scope-of-employment requirement.

might be regarded as in tension with this Court's decisions instructing that courts should not expand the FSIA's exceptions to foreign sovereign immunity beyond the boundaries set by Congress. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989) (Because Section 1605(a)(5) requires that the injury have occurred in the United States, the tort exception is not satisfied by a non-domestic tort with domestic effects.); *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 362-363 (1993) (refusing to extend the commercial activity exception to cover tortious acts that were preceded by commercial acts); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992) (strictly construing commercial activity exception's "direct effect" prong); see also Pet. 18-20. But that type of tension is not the sort of direct conflict that typically warrants the Court's plenary review. See generally Gressman 250-251.

B. Nevertheless, in the view of the United States, it may be appropriate for this Court to grant the certiorari petition, vacate the court of appeals' judgment, and remand for further consideration.

The court of appeals held that the FSIA's tort exception permits jurisdiction over a claim that falls outside the bounds established by the exception's plain text: a claim based on tortious conduct that was not committed within the scope of employment. A central purpose of foreign sovereign immunity is to afford foreign states "some present 'protection from the inconvenience of suit,'" unless the case comes within a statutory exception to immunity. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004) (emphasis omitted) (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)). That purpose is defeated if a foreign sovereign is forced to litigate on the merits a case in which no applicable

exception to immunity applies.[12] See, *e.g.*, *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 442-443 (D.C. Cir. 1990). Because improperly subjecting a foreign state to suit can in some circumstances raise foreign-relations and reciprocity concerns, the United States has an interest in ensuring that courts in the United States carefully apply the FSIA, and that they do not expand the exceptions to foreign sovereign immunity set forth in Section 1605 beyond the scope that Congress intended.

In a similar situation—where the court of appeals had plainly "committed error that was essential to its judgment" denying immunity under the FSIA—this Court has granted certiorari, vacated the judgment below, and remanded for further consideration. *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. 450, 453 (2006) (per curiam) (granting, vacating, and remanding for reconsideration because "the Ninth Circuit either mistakenly relied on a concession by respondent that could not possibly bind petitioner, or else erroneously presumed that there was no relevant distinction between a foreign state and its agencies or instrumentalities for purposes of" the immunity from attachment of foreign sovereign property). The Court may wish to make a similar disposition here.

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[12] To be sure, if petitioner ultimately prevails on remand in its argument that the priest who allegedly committed the acts of abuse was not petitioner's employee, the tort exception will not apply and petitioner will be entitled to immunity. See note 4, *supra*; Pet. App. 30a-31a. Thus, if petitioner chooses to litigate the employee issue on remand, the parties may have to engage in discovery on the issue, even though the court should have concluded that the tort exception does not apply regardless of the priest's employment status.

The court of appeals, in addition to premising its finding of jurisdiction on conduct that is outside the scope of employment as a matter of state law, appears to have also misapprehended the scope of the FSIA's tort exception to foreign sovereign immunity as a matter of federal law. See pp. 14-17, *supra*. It therefore would be appropriate for this Court to correct any such error by making clear that Section 1605(a)(5) authorizes suit against a foreign state for a tort by the state's employee only if the tort itself was committed by the employee while acting within the scope of his office or employment. The Court could then remand to the court of appeals for further consideration in light of that ruling on the interpretation of the FSIA and also in light of the decision of the Oregon Court of Appeals in *Schmidt* concluding (based on *Fearing*) that sexual abuse is not within the scope of a priest's employment.[13] Or the Court could simply vacate the judgment of the court of appeals and remand to afford that court an opportunity to clarify its interpretation of the FSIA's tort exception in the first instance and to permit further consideration in light of *Schmidt*. If the Court does not choose to vacate and remand, however, it should deny certiorari, because this case does not warrant plenary review.

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[13] *Schmidt* was decided after the Ninth Circuit heard oral argument in this case and was not addressed in the Ninth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration as set forth in this brief. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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